93-617

Supreme Court, U.S.
FILED
OCT - 4 1993
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIE J. DUNN,

PETITIONER

V.

WILMA D. SIMS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

# APPENDIX

WILLIE J. DUNN
PRO SE
4028 Juanita Circle
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Appendix A

RELEASED

MAY 28 1992

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SUPREME COURT OF ALABAMA

**SUPREME COURT OF ALABAMA**

OCTOBER TERM, 1992-93

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Ex Parte Wilma D. Sims

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(Re: Willie J. Dunn et al.

v.

Wilma D. Sims)

(Talladega Circuit Court, CV-84-077;
Court of Civil Appeals, 2910348)

MADDOX, JUSTICE.

We granted the writ of certiorari to review the holding by the Court of Civil Appeals that settlement agreements entered into in the trial court are controlled by the provisions of Rule

47, Ala.R.App.P., and that the settlement agreement signed by Willie J. Dunn, the respondent here, and his attorney, was invalid because "[t]he written document was not properly executed, i.e., not signed by the party to be charged, and the record does not contain the necessary indicia of a settlement reached in open court." Dunn v. Sims, [ms. 2910348, April 24, 1992] ___So.2d ___(Ala. Civ. App. 1992). We hold that the Court of Civil Appeals has misapplied the law, and we reverse and remand.

The background facts are recited in the opinion of the Court of Civil Appeals and need not be repeated her. However, we briefly set out the facts that are relevant to an understanding of the legal issue presented. Willie J. Dunn and his mother, Leila Dunn, filed a negligence action against Wilma D. Sims; that action arose out of an automobile accident. Leila Dunn later died from unrelated causes. Willie J. Dunn's attorneys negotitated a proposed settlement agreement with Sims's attorney. Dunn's attorneys reduced the

agreement to writing, and Dunn and his attorneys signed it. The trial court subsequently enforced the written settlement agreement, and Dunn appealed to the Court of Civil Appeals. Notwithstanding the fact that the settlement agreement was entered into in the trial court, the Court of Civil Appeals applied the provisions of Rule 47, Ala.R.App.P., and concluded that the requirements of a valid settlement agreement had not been met, and the court reversed the judgment.

There may be some confusion among the bench and bar regarding whether Rule 47, Ala.R.App.P., applies to settlement agreements reached at the trial level. We take this opportunity to hormonize the cases and guide to the bench and bar in future cases.[1]

---

[1]Pioneer Financial Services, Inc., has filed an amicus curiae brief in this case asking us to hold that Rule 47, A.R. App.P., applies to agreements reached in cases on appeal and that the provisions of Ala. Code 1975 § 34-3-21, apply to agreements reached in cases in the trial court.

Rule 47, Ala.R.App.P., provides:

> "No private agreement or consent between the parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby; provided, however, agreements made in open court or at pretrial conference are binding, whether such agreements are oral or written."

This Court and the court of Civil Appeals have not applied Rule 47 consistently. See, e.g., Wright v. Fountain, 454 So. 2d 520 (Ala. 1984); Anonymous v. Anonymous, 353 So. 2d 515 (Ala. 1977); Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App. 1987). Neither this Court nor the Court of Civil Appeals, insofar as we cam ascertain, has discussed or applied Rule 47 in light of Rule 1, Ala.R.App.P., which specifically provides that the Rules of Appellate Procedure apply only to cases on appeal. Moreover, as noted by the Honorable Ira DeMent, United States district judge, in Spurlock v. Pioneer Financial Services, Inc., 808 F.Supp. 782 (M.D. Ala. 1992), this Court has, on several occasions, reviewed the validity of settlement agreements reached in the trial

court and has on those occasions applied the provisions of Ala. Code 1975, § 34-3-21, without mentioning Rule 47. See Spurlock, 808 F.Supp. at 783, citing Beverly v. Chandler, 564 So. 2d 922, 923 (Ala. 1990); King v. Travelers Ins. Co., 513 So. 2d 1023, 1026 (Ala. 1987); Reeves v. Orkin Extermination Co., 457 So. 2d 402, 404 (Ala. 1984).

Section 34-3-21 provides: "An attorney has authority to bind his client in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." In Spurlock, Judge DeMent refused to follow the reasoning of the Court of Civil Appeals in this case, and held instead that "it would seem that Rule 47 would govern settlement agreements reached while the matter is on appeal, while section 34-3-21 would govern settlement agreements reached while the case is still at the trial level." 808 F.Supp. at 783. We agree with that interpretation.

The settlement agreement in this case meets the requirements of § 34-3-21 and is due to be

enforced. Consequently, the judgment of the Court of Civil Appeals is due to be reversed and the cause remanded with instructions to enter an appropriate order.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

Huston, Kennedy, and Ingram, JJ., concur. Shores and Adams, JJ., concur in result.

Appendix B

**APR 24 1992**

**STATE OF ALABAMA- - -JUDICIAL DEPARTMENT**

**THE COURT OF CIVIL APPEALS**

OCTOBER TERM 1991-92

2910348

Willie J. Dunn, et al.

v.

Wilma D. Sims

Appeal from Talladega Circuit Court

(CV-84-077)

**BRADLET**, Retired Appellate Judge

In 1984 Willie J. Dunn and his mother, Leila Dunn, filed a negligence action against Wilma D. Sims for damages arising from a car accident

between the parties. Dunn initially engaged Paul Phillips to represent him in the matter, and Phillips subsequently "farmed" the case out to another attorney, Greg Wood. In 1988 Leila Dunn died from causes unrelated to the accident.

In May 1990 Wood negotiated a proposed settlement agreement with Sims's attorney, providing that Sims would pay $6,200 damages to Dunn and $300 to his mother's estate. The case was set for trial on May 27. On May 25 the proposed settlement agreement was reduced to writing and signed by Dunn and his attorneys. On May 27 Dunn's attorney appeared before the trial court to present the proposed agreement and the trial date was apparently canceled. Dunn himself went before the court later that same day and vigorously refused to be bound by the agreement.

Shortly thereafter, both Wood and Phillips filed motions to withdraw as Dunn's counsel and filed attorney's liens to collect the fees due to them under the proposed settlement agreement. The motions were granted. Acting pro se, Dunn

continued to litigate the case and Sims continued her defense, with both parties filing various motions and proceeding with discovery. However, after one year, Sim's attorney filed a motion to enforce the proposed settelement and Dunn filed motions in opposition. Following an ore tenus proceeding, the trial court entered an order enforcing the written agreement. Dunn's post-judgment motions were denied and he appeals.

The dispositive issue before us is whether the trial court erred in enforcing the settlement agreement drawn up by Dunn's attorney.

Rule 47, Alabama Rules of Appellate Procedure, provides as follows:

> "No private agreement or consent between parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby; provided, however, whether such agreement are oral or written."

In this case the signature requirement of Rule 47 has not been met. The settlement document was drafted by Dunn's attorneys, and signed only

by them and Dunn. The record shows that more than a year passed before Sims's attorney even knew that the agreement had been reduced to writing. Accordingly, the settlement cannot be valid under Rule 47 unless it was properly made in open court or pretrial conference.

For purposes of the rule, "open court" means a proceeding where there are formal entries made, if only in minutes or bench notes, to record the critical litigation events and thus have available a transcript that is beyond dispute. Bowman v. Integrity Credit Corp., 507 So. 2d 104 (Ala. Civ. App. 1987). When there is no record of the alleged agreement in the reporter's transcript, nor on the docket sheet, nor in the minute entry or judgment entry, the agreement does not fall within the requirements of Rule 47. Bowman. Moreover, an agreement of the parties that is not reduced to a court order does not constitute an adjudication of a pending claim. Rudolph v. First S. Fed. Sav. & Loan, 414 So. 2d 64 (Ala. 1982).

In this case Greg Wood testified that he

went into open court on May 27, informed the trial court that Dunn's case had been settled on May 25, and thereby canceled the trial date that was scheduled. However, there is no transcript of this appearance, and the record does not show whether Sims's attorney was present. The case action summary sheet contains only the following entry; "5-25-90: proposed settlement agreement." There is no notation elsewhere in the record concerning an appearance by either Wood or Dunn in regards to the settlement, nor is there any further mention of the agreement itself. The trial court never entered an order ratifying the settlement or dismissing the case, and the record contains no bench notes or other evidence to show that the court intended to do so.

The court subsequently granted the motions of Dunn's attorneys to withdraw from the case and to attach attorneys' liens to collect their fees. However, the court made the liens "contingent upon the outcome of the case being favorable to the Plaintiff." Obviously, the outcome of

a settled case is not in question; thus, the language of the court's order clearly indicates that the case was still pending at that time. The court granted Dunn's motion to act in his own behalf, then continued to hear and rule upon various motions filed in the case by both Dunn and Sims's attorney for an entire year after the aettlement agreement was allegedly made in open court.

After reviewing the record in full, we must conclude that the requirements of a valid settlement agreement were not met in this case. The written document was not properly excuted, i.e. not signed by the party to be charged, and the record does not contain the necessary indicia of a settlement reached in open court. As noted on the case action summary sheet, the agreement was never more than a proposed settlement; thus, under Rule 47 it cannot be "alleged or suggested" by either party against the other. Accordingly, we hold that the trial court erred in granting Sims's motion to enforce the written agreement. The court's judgment is reversed and the cause

remanded for further proceedings.

The foregoing opinion was prepared by Retired Appellate Judge Robert P. Bradley while serving on active duty status as a judge of this court under provisions of § 12-18-10(e), Code 1975, and this opinion is adopted as that of the court.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

All the judges concur

Appendix C

**IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA**

WILLIE J. DUNN, et al. *

Plaintiff, *

VS. * CIVIL ACTION NO.

WILMA D. SIMS, * CV 84-77

Defendant. *

**ORDER**

This matter cam before the court on the 30th day of July, 1991 upon the defendant's motion to enforce a settlement agreement between the parties. The court heard the testimony of Willie J. Dunn who is a plaintiff individually and plain-

tiff in his capacity as administrator of the Estate of Lela P. Dunn, deceased. The court also heard testimony of B. Greg Wood, an attorney at law who represented the plaintiff until his withdrawal in June of 1990. The court further heard testimony of Ralph D. Gaines, III who represented the defendant at said hearing. The remaining plaintiff, Susan Dunn was not present nor has she opposed the defendant's motion

Upon consideration of the testimony, evidence and argument presented in open court as well as established case law and authority pertaining to this matter, the court finds that an enforceable agreement for settlement of this action was reached between the parties. In reaching its decision the court makes the following findings of facts:

1. The plaintiffs were represented by an attorney who had authority to bind his clients by entering into an agreement for settlement of this action. Both Mr. Dunn and Mr. Wood testified a settlement of this action was negotiated and agreed upon between the attorneys for the parties

on May 25, 1990.

2. Mr Dunn was kept informed of settlement negotiations. The testimony revealed Mr. Dunn was in the immediate presence and hearing of his attorney, B. Greg Wood, while Mr. Wood was negotiating by telephone with the attorney for the defendant. The testimony further confirmed Mr. Dunn was kept fully informed as to the progress of the negotiations and the terms of settlement negotiated.

3. An agreement for settlement of this action in its entirety was reached between the attorneys for the parties.

4. The plaintiffs were fully aware of the terms of the settlement which was reduced to writing and reflected in that document entitled "Settlement Agreement" which was executed by Willie J. Dunn individually and as administrator of the Estate of Lela P. Dunn.

5. The plaintiffs authorized their attornay to enter into an agreement to settle this action on May 25, advised the court the case had been

settled thereby precluding the necessity for a trial which was scheduled for May 28.

6. The attorney for the plaintiffs did in fact advise the court the case had been settled.

Upon consideration of the foregoing, the court is of the opinion the settlement agreement reached between the parties is due to be enforced pursuant to the terms as set forth in the settlement agreement dated May 25, 1990. It is therefore

**ORDERED, ADJUDGED AND DECREED** that the defendant pay to the Circuit Clerk of Talladega County the sum of Six Thousand Two Hundred and No/100 ($6,200.00) Dollars for settlement of the claims of Willie J. Dunn and Susan Dunn and the sum of Three Hundred and No/100 ($300.00) Dollars for settlement of the claims of the estate of Lela P. Dunn.

The clerk of this court is hereby directed not to distribute proceeds from the settlement until further direction from the court. Costs to be assessed against the defendant.

Done this 13th day of August, 1991.

Circuit Court Judge

Appendix D

**IN THE CIRCUIT COURT FOR TALLADEGA COUNTY, ALABAMA**

WILLIE J. DUNN, ETAL, *

PLAINTIFFS *

VS. * CIVIL ACTION NUMBER:

WILMA SIMS, ETAL, * CV 84 077

DEFENDANTS *

**JUDGMENT**

This matter coming on for hearing on the Motion for Attorney's Lien filed by B. Greg Wood, and the Motion for Attorney's Lien filed by Paul A. Phillips, former attorneys for the plaintiffs in this matter, on September 20, 1990, and the Court having considered the arguments of said movants, and Willie J. Dunn, Plainitff, **IT IS THE JUDGMENT OF THE COURT** that said motions for attorney's liens are due to be granted as herein provided.

**IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED** by the Court as follows:

1. That the former attorneys for the Plaintiffs in this case, B. Greg Wood and Paul A. Phillips, shall have a lien upon any monies recovered by Plaintiffs or either of them in this action, in the total amount of One Thousand, Nine Hundred Fifty and No/100 ($1,950.00) Dollars; that the right of attorneys to recover under this lien shall be contingent upon the outcome of the case being favorable to Plaintiffs or either of them. The lien herein established is in lieu of any reimbursement to said attorneys for expenses, Court costs or other charges which might be otherwise due said attorneys from the Plaintiffs.

**DONE** and **ORDERED** this 19 day of November, 1990.

_____

**CIRCUIT JUDGE**

Appendix E

**SPURLOCK v.PIONEER FINANCIAL SERVICES, INC.,**
Cite as 808 F.Supp. 782 (M.D.Ala.1992)

Bobby **SPURLOCK**, Plaintiff,

v.

**PIONEER FINANCIAL SERVICES, INC. et al.**, defendants.

Civ. A. No. 90-D-840-N

United States District Court,

M.D. Alabama, N.D.

Oct. 28, 1992.

Fraudulent inducement claim was brought, and settlement agreement was reached. The United States Magistrate Judge Coody, recommended denial of motion to enforce settlement agreement since it was not signed. The District Court, DeMent, J. held that agreement was governed by Alabama statute that does not require settlement agreement to be signed, rather than Alabama rule of appellate procedure requiring settlement agreement to be signed by party to be bound.

Motion granted.

1. **Compromise and Settlement** 5(1)

Alabama statute does not require settlement agreement to be signed, rather than Alabama rule of appellate procedure requiring settlement agreement to be signed by party to be bound governed settlement agreement entered into before case was appealed. Ala. Code 1975, § 34-3-21; Ala. Rules App. Proc., Rules 1, 47.

2. **Federal Courts** 384

It is permissible for federal court to reject reasoning of state appellate court decision where decision appears to be contradictory to that court's other decisions.

**ORDER**

De Ment, District Judge

Now before the court is the recommendation of the Magistrate Judge, entered on July 20, 1992. Respondents filed objections to the Magistrate's Recommendation on July 20, 1992. Upon an independent evaluation of this matter, the court adopts

the Magistrate's reasoning and conclusions as to the plaintiff's fraudulent inducement claim. However, the court declines to adopt the Magistrate's reasoning or conclusion as related to the defendants' motion to enforce the settlement agreement. For the following reasons, the court determines that the defendants' motion to enforce the settlement agreement is due to be granted and the settlement is due to be enforced.

**BACKGROUND**

On May 22, 1991, Magistrate Judge Coody entered a recommendation that the defendants' motion to enforce the settlement agreement should be denied. In the recommendation, he relied on Rule 47 of the Alabama Rules of Appellate Procedure. The defendants objected to this recommendation.

In an order dated August 28, 1991, District Judge Thompson declined to accept the recommendation. He reasoned that section 34-3-21 of the Alabama Code should govern the enforcement of settlement agreement reached prior to trial. Instead of overruling the recommendation, Judge

Thompson referred the matter back to Judge Coody for "further appropriate proceedings" consistent with the order.

On July 20, 1992, Judge Coody issued a second recommendation. Again, he found that Rule 47 of the Alabama Rules of Appellate Procedure was the controlling statute, relying this time upon cases which were handed down by the Alabama Court of Civil Appeals after Judge Thompson's order. Again, the defendants have filed objections to the recommendation.

**DISCUSSION**

[1] As correctly stated by the Magistrate Judge, because this is a diversity case, Alabama law controls the construction and effect of the settlement agreement. Rule 47 of the Alabama Rules of Appellate Procedure requires that a settlement agreement be in writing and "signed by the party bound thereby."[1] In contrast, section

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1. Appellate Rule 47 reads:

No private agreement or consent between

34-3-21 of the Alabama Code does not require a settlement agreement to be signed by the parties.[2]

At first the matter appears deceptively simple. Rule 1 of the Alabama Rules of Appellate Procedure states that "[t]hese rules govern appeals to the supreme Court, the Court of Civil Appeals and the Court of Criminal Appeals, and the proceedings on petitions for writ or other relief which these judges are empowered to grant."

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the parties or their attorneys relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing and signed by the party to be bound thereby; provided, however, that agreements made in open court or at pretrial conference are binding, whether such agreements are oral or written.

2. Section 34-3-21 states that "an attorney has authority to bind his client, in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." The Alabama Supreme Court has several times enforced a settlement agreement against a party when the agreement was entered into by the party's attorney and was not signed by the party. See e.g. Beverly v. Chandler, 564 So. 2d 922, 923 (Ala. 1990)

On the other hand, section 34-3-21 states that it governs settlement agreements "in any action of proceeding." Thus it would seem that Rule 47 would govern settlement agreements reached while the matter is on appeal, while section 34-3-21 would govern settlement agreements reached while the case is still at the trial level.

In general, this appears to be the practice. There are several cases in which the Alabama Supreme Court reviewed the finding of a settlement agreement's validity, referring solely to section 34-3-21, without any mention of Rule 47. See, e.g., Beverly v. Chandler, 564 So.2d 922, 923 (Ala. 1990); King v. Traveler Ins. Co., 513 So.2d 1023, 1026 (Ala. 1987); Reeves v. Orkin Exterminating Co., 457 So.2d 402, 404 (Ala. 1984). In at least one case where the settlement agreement was reached while the case was on appeal, the appellate court applied Rule 47 to review the settlement's validity. See, e.g., Bush v. Evans, 598 So.2d 952, 953 (Ala. Civ.App. 1992). The one case which mentions both

statutes, Phillips v. Knight, 559 So.2d 564 (Ala. 1990), does not resolve the arguable conflict between the appellate rule and the statute. In Phillips there was no written agreement, either signed or unsigned, so the oral agreement would have been invalid under either rule.[3]

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3. If six words were added to the appellate rule, it would be compatible with section 34-3-21, viz:

> No private agreement or consent between the parties or their attorneys relating to the proceedings in any cause, shall be alleged or suggested by either the other, [while said cause is on appeal] unless the same be in writing and signed by the party to be bound thereby; provided,however that agreements made in open court or at pretrial conferences are binding whether such agreements are oral or written.

Because Appellate Rule 1 specifically limits the application of the appellate rules to matters which are on appeal, the court believes that the reading suggested above is the one which comports best with language of the appellate rules and with the standard procedure among lawyers and courts.

The "agreements made in open court or at pretrial conferences," which need not be written refer to agreements made on the record in the court below (whether

The Magistrate Judge cites a recent case, Dunn v. Sims, No. 2910348, 1992 WL 80778, 1992 Ala.Civ.App. LEXIS 191 (Ala.Civ.App. April 24, 1992) (writ of certiorari granted on August 25, 1992) for the proposition that Rule 47 can control cases which are not on appeal. The Dunn court, without referring to section 34-3-21 or referring to any judicial precedent, held a settlement agreement invalid because it had not been signed by both parties,[4]

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taken by a court reporter or noted by the trial judge on his or her docket sheet), before the appellate court itself (if this has ever happened) or at a pretrial conference where the court might have entered the fact or terms of a settlement on the agreed to or proposed pretrial order.

4. In Dunn, plaintiff's counsel negotiated a proposed settlement agreement with the defendant's attorney. The agreement was later reduced to writing by the plaintiff's attorney, evidently without consulting the defendant's lawyer. The document was signed by plaintiff Willie Dunn and his attorneys. Three days later, Dunn himself went before the trial court and repudiated the agreement. Both parties then proceeded with discovery and continued to file motions. After a year had passed the defendant filed a motion to enforce

[2] With the greastest deference to the Alabama Court of Civil Appeals and in particular deference to the learned judge who wrote the opinion in Dunn, the court doest not believe that Dunn is a correct statement of Alabama law. While the applicability of the statute and the appellate rule is not settled, given the plain meaning of the appellate rules and of the statute and given the holdings of several cases decided by the state's highest court, it appears that section 34-3-21 controls the making of settlement agreements which are entered into before the case is appealed.[5] Because the

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the settlement. The court granted the motion. Id. 1992 WL 80778 at *1, 1992 Ala. Civ. App. LEXIS 191 at *1.

On appeal, the Dunn court, without mentioning section 34-3-21, held the settlement agreement invalid because it was not signed in accordance with Ruel 47. In so ruling, the appellate court seemed to find compelling the fact that the defendant did not know that the proposed settlement agreement had been reduced to writing. Id. 1992 WL 80778 at *1-2, 1992 Ala. Civ.LEXIS 191 at *2.

5. Although it may be unusual, it is permissible for a federal judge to reject the reasoning of a state appellate court

parties complied with the requirements of section 34-3-21, the court finds that the settlement agreement entered into is a valid agreement and is enforceable.

Accordingly, it is **CONSIDERED** and **ORDERED** that the defendants' motion be and the same is hereby **GRANDED.** The parties are **DIRECTED** to abide by the terms and conditions of the settlement agreement.

Appendix F

Standley **D. BOWMAN,** a/k/a & d/b/a
**Bowman Accounting**

**v.**

**INTEGRITY CREDIT CORP, f/k/a**
**Tri-Continental Leasing**

**Civ. 5713**

Court of Civil Appeals of Alabama

**April 1, 1987**

---

decision where that decision appears to be contradictory to that court's other decisions. See, e.g., Fondren v. Allstate Ins. Co., 790 F.2d 1533, 1535 n.4 (11th Cir.1986) (rejecting the reasoning of an Alabama Supreme Court case where it "flatly contradicts" other cases and where it "flatly contradicts" other cases and where it "does not appear to be a correct statement of

Credit company brought action against accountant for recovery under lease agreement. The Circuit Court, Baldwin County, Charles C. Partin, L., entered order granting credit company's motion to enforce oral settlement agreement and subsequently entered order amending prior judgment to include dismissal with prejudice of all counterclaims, and accountant appealed. Credit company moved to dismiss appeal as untimely. The Court of Civil Appeals L. Charles Wright, Retired Appellate Judge, held that: (1) judgment granting credit company judgment without mentioning counterclaims was not final judgment for purposes of appeal, and (2) motion averring that settlement agreement between counsel had been reached and that court had been informed of such agreement did not satisfy rule requiring that oral agreements be made in open court or at pretrial conference.

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Alabama law").

**Reversed and remanded.**

1. **Appeal and error 80(6)**

Entry of judgment awarding money to plaintiff, thereby enforcing oral settlement agreement, without mentioning defendant's counterclaims, was not final judgment for purposes of appeal, absent express judicial determination that such judgment was final. Rules Civ. Proc., Rule 54.

2. **Judgment 194, 233**

Judgment against less than all parties or upon less than all claims does not terminate action as to any parties or claims. Rules Civ. Proc., Rule 54.

3. **Compromise and Settlement 5(3)**

Rule that oral agreement between parties or their attorneys be made in open court or at pretrial conference requires acknowledgment of such agreement in judgment entry. Rules App. Proc., Rule 47.

4. **Compromise and Settlement 5(3)**

Motion averring that settlement agreement had been reached between counsel and that court was

informed of such agreement did not satisfy rule requiring that oral agreement be made in open court or at pretrial conference, absent formal record entry of such agreement, particularly where motion conceded that counsel for nonmoving party indicated that he wanted his client to execute written stipulation of consent to judgment to be filed for record. Rules App. Proc., Rule 47.

5. **Judgment** 88

In entering judgment upon receipt of notices of settlement given by phone, court should make minute entry or note in judgment as to how judgment came about. Rules App. Proc., Rule 47.

Stanley D. Bowman, pro se.

Russell S. Terry and Eric J. Breithaupt of Feibelman, Shulman and Terry, Mobile, for appellee.

**L. CHARLES WRIGHT**, Retired Appellate Judge.

Integrity Credit Corporation (plaintiff) brought suit against Bowman (defendant) for recovery under a lease agreement in 1983. After pleadings, discovery, and counterclaim, the case was set for trial in the Circuit Court of Baldwin

County, Alabama, on October 21, 1986. On October 17, oral agreement was reached between counsel for settlement and entry of judgment in favor of plaintiff for a specific sum. On the date set for trial, plaintiff filed a motion to enforce the oral agreement by entry of judgment. The motion averred that a settlement agreement between counsel had been reached on October 17, 1986, and the court informed of the agreement; that counsel for defendant indicated that he wanted his client to execute a written consent in court for the record; that plaintiff, relying on the oral agreement, had excused his witness from appearing at trial and was, thus, unable to proceed with trial; plaintiff, therefore, asked the court to enforce the oral agreement.

On October 23, 1986, the court entered on its case action summary sheet the following:

> "Motion to enforce settlement agreement granted. Judgment entered in favor of plaintiff and against defendant in the sum of $5,7500 [sic] plus cost of court."

On November 4, 1986, the trial court filed the

following order:

> "Plaintiff having filed a 'Motion to Enforce Settlement Agreement' in this matter moving the Court to enter judgment against Defendant, **STANLEY DWIGHT BOWMAN**, and in favor of Plaintiff, **INTEGRITY CREDIT CORPORATION**, for the sum of $5,750.00, and dismissing said Defendant's counterclaim against Plaintiff,with prejudice; and counsel for both parties having had ample opportunity to offer arguments with respect to said motion by telephone conference call on Friday, October 17, 1986; and the Court having duly considered Plaintiff's said motion and having entered an order on October 23, 1986, granting said motion and entering judgment in favor of Plaintiff and against Defendant in the sum of $5,750.00 plus costs of court but otherwise not addressing Defendant's counterclaims against Plaintiff;
>
> "it is hereby **ORDERED, ADJUDGED** and **DECEED** that said order and entry of judgment of October 23, 1986, is hereby amended to include the dismissal, with prejudice, of each and every counterclaim filed in this action by Defendant, **STANLEY DWIGHT BOWMAN**, against Plainitff, **INTEGRITY CREDIT CORPORATION.**
>
> "Dated on this, the 4th day of Novenber, 1986.
>
> "/s/ Charles C. Parin
> **"CHARLES C. PARTIN**
> **"CIRCUIT JUDGE"**

On December 9, 1986, defendant, acting pro se, filed a notice of appeal from the judgment of October 23, 1986. Defendant appears before this court pro se, presenting the issue of whether an

oral agreement between opposing attorneys for entry of judgment not made in open court is binding and may be enforced by the court. Before addressing the merits of the issue, the court will dispose of the motion of plaintiff to dismiss the appeal as untimely.

**Motion to Dismiss Appeal**

**[1,2]** We have previously noted that the initial entry of judgment was on October 23, 1986. That entry gave judgment for money to plaintiff but made no mention of defendant's counterclaim. Thus, the first judgment falls within the provisions of Rule 54, A.R.Civ.P. Rule 54 provides that a judgment which fails to dispose of all claims presented in the action, including counterclaims, is not final for purposes of appeal unless expressly determinated to be so by the court. Goza v. Everett, 365 So.2d 257 (Ala.1978); Wesley v. Brandon, 419 So.2d 257 (Ala.Civ.App.1982). No such express determination was entered in this case. A judgment of less than all the parties or upon all the claims does not terminate the action as to any of the parties

or claims. The judgment thus entered is subject to revision or correction at any time prior to the entry of a judgment which does terminate all claims or rights of the parties. Hallman v. Marion Corp., 411 So.2d 130 (Ala.1982). Therefore, the final judgment was not entered until November 4, 1986. We consider the notice of appeal, although directed to the entry of October 23, 1986, to have been timely filed on December 9, 1986. The motion to dismiss the appeal is denied.

**On the Issue**

[3] There is no record of evidence in this case. The only record of events is that of the clerk, including the motion to enforce the oral agreement and the judgment entries of the court. THe statement of events contained in the motion to enforce is not sworn. The judgment of November 4, 1986, contains a statement as previously quoted herein, that indicates that counsel for both parties had "opportunity to offer arguments

with respect to said motion by telephone conference call on Friday, October 17, 1986." However, the record indicates that the motion to enforce settlement referred to in the order was not final until October 21, 1986. The motion itself states that the agreement was made on October 17, Therefore, obviously there is conflict in the record as to the occurrence of events relating to the alleged settlement agreement upon which the judgment is founded.

It had long been the law of Alabama that private agreements between parties or their attorneys must be in writing and signed by the party to be bound thereby. Former Supreme Court Rule 20. The rule was extended by the courts to include the use of oral agreements made in open court or at pretrial conference. Crawford v. Tucker, 258 Ala. 658, 64 So.2d 411 (1953); Preswood v. Watson, 111 Ala. 604, 20 So. 600 (1895). Present Rules of Appellate Procedure Rule 47 includes these extensions. Jones v. Gladney, 339 So.2d 1019 (Ala.1976); Anonymous v. Anonymous, 353 So.2d 515 (Ala.1977). Al-

though Rule 47, A.R.A.P., adopted the extension providing for oral agreements, it remains necessary that such agreement be made in open court. Anonymous, supra, at 518.

The esteemed Mr. Justice Bloodworth, writing for the Court in Anonymous adopted the explanation of the term "open court" stated by the New York court in the case of In re Dolgin Eldert Corporation, 31 N.Y.2d 1, 334 N.Y.S.2d 833, at 840, 286 N.E.2d 228, at 233. Stated succinctly, "open court" means a proceeding where there are formal entries made, if only in minutes or bench notes, to record the critical litigation events, so that transcript beyond dispute and fallibility of memory is available. The court concluded in Anonymous that in a case where there is no record of the alleged agreement in the reporter's transcript, nor on the docket sheet, nor in the minute entry, the agreement does not fall within the rule. We might add the additional condition that where there is no acknowledgement of such an agreement in the judgment entry, the requirement of the rule is

not satisfied.

[4] In this case, none of the conditions of an "open court" agreement are disclosed. Whether there was ever an agreement for settlement in any form is contained only in a nonevidentiary pleading. Even the allegations of that pleading do not satisfy the conditions of an "open court" proceeding. We are not prepared in this case to decide whether notice by counsel via telephone meets the criteria of an "open court" proceeding. The court is bound by the record in all cases. There is nothing in the record to satisfy the requirements of a binding agreement under Rule 47, A.R.A.P., which could be enforced by judgment. To the contrary, plaintiff's motion to enforce the agreement concedes that though agreement between counsel had been reached, counsel for defendant indicated that he wanted his client to execute a written stipulation of consent to judgment to be filed for the record. The record discloses no such stipulation. Had such stipulation been executed and filed, then Rule 47 would have been satisfied and the agreement binding. If

the stated desire of counsel to secure a written stipulation from defendant is accepted, such fact raises the additional question of whether the agreement was conditional upon the filing of such stipulation.

[5] This court is of the opinion that the judgment entered was based upon a nonbinding agreement of counsel and must be set aside. We recognize that in practice many notices of settlement are given by phone and judgment entered thereon without problem. However, it would be advisable for the court to make minute entry or note in the judgment how it came about.

The foregoing opinion was prepared by Retired Appellate Judge **L. CHARLES WRIGHT** while serving on active status as a judge of the court under provisions of § 12-18-10(e), Code 1975, and is hereby adopted as that of the court.

**REVERSED AND REMANDED.**

All the Judges concur.

Appendix G

**IN THE SUPREME COURT OF ALABAMA**

**July 23, 1993**

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims). (29103 48) (Talladega: CV-84-077)

**NOTICE**

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

**MADDOX, J.** - Hornsby, CJ., Shores, Houston and Kennedy, JJ., concur

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23 day of July, 1993.

Robert G. Esdale

Clerk, Supreme Court of Alabama

**Appendix H**

**OFFICE OF**

**CLERK OF THE COURT OF CIVIL APPEALS**

**STATE OF ALABAMA**

Re: CIV. 2910348 May 22, 1992

Willie J. Dunn, et al. vs. Wilma D. Sims
**Appellant** **Appellee**

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell____ granted 7 additional days to file brief(s) to and including

____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

____ Record on Appeal filed on this date.

____ Appendix Filed on this date.

____ Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted.

____ Transferred to the Supreme Court for lack of jurisdiction. A/N

**XXX OPINION MODIFIED; APPLICATION FOR REHEARING OVERRULED.**

John H. Wilkerson, Jr.
Clerk, Court of Civil
Appeals of Alabama

**COURT OF CIVIL APPEALS OF ALABAMA**

250 Governors Park Building
2600 E. South Boulevard
Montgomery, Alabama 36116

**May 22, 1992**

This is to certify that the attached pages 1, 2, & 4 of the opinion in case #2910348, Dunn v. Sims, which was released on April 24, 2992, has been substituted for the original page on Friday, May 22, 1992.

Willie E. Roberson

Robert J. Russell

**STATE OF ALABAMA - - -JUDICIAL DEPARTMENT**

**THE COURT OF CIVIL APPEALS**

**OCTOBER TERM 1991-92**

2910348

**Willie J. Dunn, et al.**

**v.**

**Wilma D. Sims**

**Appeal from Talladega Circuit Court**

**(CV-84-077)**

**BRADLEY**, Retired Appellate Judge

In 1984, Willie J. Dunn and his mother, Leila Dunn, filed a negligence action against Wilma D. Sims for damages arising from a car accident between the parties. Dunn initially engaged Paul Phillips to represent him in the matter, and Phillips subsequently associated another attorney, Greg Wood. In 1988 Leila Dunn died from causes unrelated to the accident.

In May 1990 Wood negotiated a proposed settlement agreement with Sims's attorney, providing that Sims would pay $6,200 damages to Dunn and $300 to his mother's estate. The case was set for trial on May 28. On May 25 the proposed settlement agreement was reduced to writing and signed by Dunn and his attorneys. On May 28 Dunn's attorney appeared before the trial court to present the

proposed agreement and the trial date was apparently canceled. Dunn himself went before the court later that same day and virgorously refused to be bound by the agreement.

Shortly thereafter, both Wood and Phillips filed motions to withdraw as Dunn's counsel and filed attorney's liens to collect the fees due to them under the proposed settlement agreement. The motions were granted. Acting pro se, Dunn continued to litigate the case and Sims continued her defense, with both parties filing various motions and proceeding with discovery. However, after one year, Sims's attorney filed a motion to enforce the proposed settlement and Dunn filed motions in opposition. Following an ore tenus proceeding, the trial court entered an order enforcing the



only in minutes or bench notes, to record the critical litigation events and thus have available a transcript that is beyond dispute. Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App.

1987). When there is no record of the alleged agreement in the reporter's transcript, nor on the docket sheet, nor in the minutes entry or judgment entry, the agreement does not fall within the requirements of Rule 47. Bowman. Moreover, an agreement of the parties that is not reduced to a court order does not constitute an adjudication of a pending claim. Rudolph v. First S. Fed. Sav. & Loan, 414 So.2d 64 (Ala. 1982).

In this case Greg Wood testified that he went into open court on May 26, informed the trial court that Dunn's case was settled on May 25, and thereby canceled the trial date that was scheduled. However, there is no transcript of this appearance, and the record does not show whether Sims's attorney was present. The case action summary sheet contains only the following entry: "5-25-90: ptoposed settlement agreement." There is no notation elsewhere in the record concerning an appearance by either Wood or Dunn in regards to the settlement, nor is there any further mention of the agreement itself. The trial court never

Appendix I

AUG 27 1993

STATE OF ALABAMA - - -JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS
SPECIAL TERM 1993

2910348

Willie J. Dunn, et al.

v.

Wilma D. Sims

Appeal from Talladega Circuit Court

After Remand from Supreme Court

**Wright,** Retired Appellate Judge

**Whereas,** on May 28, 1993, the Supreme Court of Alabama entered its judgment reversing the judgment of this court entered on April 24, 1992;

**Therefore,** it is now the judgment of this court that its judgment of April 24, 1992, be, and is, set aside, and the judgment of the Circuit Court of Talladega County, Alabama, be in all respects affirmed.

The foregoing was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the

provisions od § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

**AFFIRMED.**

All the judges concur.

I, John H. Wilkerson, Jr. Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 27th day of Aug. 1993.

John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

Appendix J

**IN THE SUPREME COURT OF ALABAMA**

**MAY 28, 1993**

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims). (2910348) (Talladega: CV-84-077)

**CERTIFICATE OF JUDGMENT**

**Whereas,** on August 21, 1992, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuit to Rule 39, Alabama Rules of Appellant Procedure,

**Whereas,** came the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, IT IS CONSIDERED AND ORDERED that the judgment of the Court of Civil Appeals be reversed and annulled and this case is remanded to the Court of Civil Appeals with instructions to enter an appropriate order. NO COSTS TAXED.

OPINION BY MADDOX, J

Houston, Kennedy and Ingram, JJ., concur
Shores and Adams, JJ., concur in the result.

I, Robert G. Esdale; as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear (s) of record in said Court.

Witness my hand this 8th day of Sept., 1993.

Robert G. Esdale

Clerk, Supreme Court of
Alabama

Appendix K

**THE STATE OF ALABAMA - - -JUDICIAL DEPARTMENT**

**IN THE SUPREME COURT OF ALABAMA**
**SEPTEMBER 8, 1992**

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THECOURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims) (29103 48)

**NOTICE**

Respondent granted to September 11, 1992 to file brief.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 8th day of Sept., 1992.

Robert G. Esdale/nst

Clerk, Supreme Court of
Alabama

Appendix L

**THE STATE OF ALABAMA - - -JUDICIAL DEPARTMENT**

**IN THE SUPREME COURT OF ALABAMA**

March 31, 1992

1910396

Willie J. Dunn, et al.

v.

Talladega Circuit Court
CV-84-077

Wilma D. Sims

**ORDER**

It appears to the Court that this cause is within the appellate jurisdiction of the Court of Civil Appeals.

IT IS, THEREFORE, ORDERED that this cause is transferred to the Court of Civil Appeals.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 31st day of March, 1992.

Robert G. Esdale

Clerk, Supreme Court of Alabama

Appendix M

**THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT**
**IN THE SUPREME COURT OF ALABAMA**
August 21, 1992

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims) (2910348)

**ORDER**

Petition for writ of certiorari to the Court of Civil Appeals is granted. Se Rule 39(f) and (h), Alabama Rules of Appellate Procedure, for instructions regarding the filing of additional briefs and oral argument.

PER CURIAM - HORNSBY, CJ., MADDOX, SHORES, HOUSTON AND KENNEDY, JJ.

PLEASE USE THE ABOVE CASE NUMBER ON ALL FILING IN CONNECTION WITH THIS CASE.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 21st day

of Aug., 1992.

Robert G. Esdale/nst
Clerk, Supreme Court of Alabama

Appendix N

**THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT**
**IN THE SUPREME COURT OF ALABAMA**
November 17, 1992

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims) (2910348)

**NOTICE**

Motion of Pioneer Financial Services, Inc. to file amicus curiae briefs granted and briefs filed.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Robert G. Esdale
Clerk, Supreme Court of Alabama